Supreme Court, U.S.
FILED
95 • 568 OCT 3 - 1995
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

In the Matter of S. SIMPSON GRAY, a Disbarred Attorney,
For Reinstatement to the Bar of the State of New York,

Petitioner,

STATE OF NEW YORK GRIEVANCE COMMITTEE FOR THE NINTH JUDICIAL DISTRICT

and

SUPREME COURT OF THE STATE OF NEW YORK APPELLATE DIVISION, SECOND JUDICIAL DEPARTMENT COMMITTEES ON CHARACTER AND FITNESS,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE COURT OF APPEALS OF THE
STATE OF NEW YORK

PETITION FOR A WRIT OF CERTIORARI

SIMPSON GRAY
Pro Se
165-30 145th Avenue
Springfield Gardens, New York 11434
(718) 527-6941

October 1995

35 pp

QUESTIONS PRESENTED

1. If a disbarred attorney seeks readmission to a state bar, does due process entitle him to a hearing before the Committees on Character and Fitness or the admitting court.

2. Where such a hearing is granted, does due process entitle him to have notice of and an opportunity to respond to post-hearing *ex parte* communications relied upon in the decision not to reinstate.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	v
OPINIONS BELOW	2
JURISDICTION	2
CONSTITUTIONAL PROVISION INVOLVED	2
STATEMENT OF THE CASE	2
REASONS FOR GRANTING THE PETITION	4
I. New York State's Denial of Procedural Due Process Rights of Disbarred Attorneys Seeking Reinstatement Conflicts with the Leading Decisions of this Court and Aggravates the Existing Conflict among the Various State Courts	4
II. New York's Decision to Deny 14th Amendment Due Process Rights Is Erroneous	6
III. The Questions Presented Are Important	8
CONCLUSION	10
APPENDIX A	A-1
APPENDIX B	A-5
APPENDIX C	A-9
APPENDIX D	A-10
APPENDIX E	A-13
APPENDIX F	A-15

TABLE OF AUTHORITIES

Cases	Page
Bonner v. Disciplinary Bd. of Ala. State Bar, 401 So.2d 734 (Ala. 1981)	5
Brooks v. Fairfield Cty Comm. on Recommendations for Admission to the Bar, 409 F.Supp. 47 (1976)	5
Application of Dinan, 244 A.2d 608 (Conn. 1968)	5
Elledge v. Alabama State Bar, 572 So.2d 424 (Ala. 1990)	5
Ex Parte Garland, 71 U.S. 333 (1866)	7
Matter of Gray, 113 A.D.2d 500, 496 N.Y.S.2d 514 (2nd Dept. 1985)	2
Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123 (1951)	7
In re Kone, 90 Conn. 440, 97 A. 307 (1916)	5
Leis v. Flynt, 439 U.S. 438 (1979)	7
Application of Licato, 104 A.D.2d 20, 481 N.Y.S.2d 690 (1st Dept. 1984)	6
Matter of Mairs, 102 A.D.2d 146, 476 N.Y.S.2d 551 (1st Dept. 1984)	6
Mattox v. Disciplinary Panel of U.S. District Court, 758 F.2d 1362 (1985)	6
Morgan v. United States, 304 U.S. 1 (1938)	8, 9
Supreme Court of New Hampshire v. Piper, 470 U.S. 274 (1985)	7
In re Rowe, 73 N.Y.2d 336, 537 N.E.2d 616, 540 N.Y.S.2d 231 (1989)	4, 5, 6
Schware v. Board of Exam. of State of New Mexico, 353 U.S. 232 (1957)	*passim*

Cases	**Page**
Willner v. Committee on Character and Fitness, 373 U.S. 96 (1963)	*passim*
Worley v. Alabama State Bar, 572 So.2d 1239 (Ala. 1990)	5
Statutes and Rules	
U. S. Const. amend. XIV	*passim*
28 U.S.C. § 1257(a)	2
N.Y. Judiciary Law § 90 (4)-(5) (McKinney 1983)	2, 8
Ala. Code, Rules of Disciplinary Procedure, Rule 28	5, 6

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

In the Matter of S. SIMPSON GRAY, a Disbarred Attorney,
For Reinstatement to the Bar of the State of New York,

Petitioner,

STATE OF NEW YORK GRIEVANCE COMMITTEE FOR THE NINTH JUDICIAL DISTRICT

and

SUPREME COURT OF THE STATE OF NEW YORK APPELLATE DIVISION, SECOND JUDICIAL DEPARTMENT COMMITTEES ON CHARACTER AND FITNESS,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE COURT OF APPEALS OF THE
STATE OF NEW YORK

PETITION FOR A WRIT OF CERTIORARI

Simpson Gray respectfully petitions for a writ of certiorari to review the judgment of the Court of Appeals of the State of New York in this case.

OPINIONS BELOW

The opinion of the Court of Appeals (App., *infra,* A9) is unreported. The opinions of the Supreme Court, Appellate Division (App., *infra,* A1-A4, A5-A8) are unreported.

JURISDICTION

The Court of Appeals of the State of New York entered its judgment on July 5, 1995, denying petitioner's motion for leave to appeal (App., *infra,* A9). The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISION INVOLVED

Section 1 of the 14th Amendment to the United States Constitution provides in relevant part, "nor shall any State deprive any person of life, liberty, or property, without due process of law..."

STATEMENT OF THE CASE

On December 30, 1985, petitioner was disbarred from the practice of law in the State of New York by order of the Supreme Court, Appellate Division, Second Judicial Department, based on a felony conviction. *Matter of Gray*, 113 A.D.2d 500, 496 N.Y.S.2d 514 (2nd Dept. 1985). Petitioner filed a Petition for Reinstatement with the Supreme Court of the State of New York, Appellate Division, Second Judicial Department dated July 22, 1995, after waiting more than the seven years mandatory period pursuant to §90 of the Judiciary Law, subdivision 5. App., *infra,* A11-A12. Petitioner's motion was held in abeyance and the matter was referred to the Committees on Character and Fitness for investigation and report as to the petitioner's current fitness to be an attorney.

The Committees on Character and Fitness then referred petitioner's application for reinstatement to a Subcommittee. A hearing before the Subcommittee was held on March 11, 1994, where petitioner made an opening statement and answered questions of the Subcommittee members. At some point subsequent to this hearing, the Subcommittee received

an *ex parte* communication from the Client Security Fund regarding an outstanding balance owed by petitioner which was in direct contrast to his testimony during the hearing. Petitioner was never informed of this post-hearing *ex parte* communication, neither was he given an opportunity to respond.

The Committees on Character and Fitness in its Report to the Court adopted the recommendation of the Subcommittee which included the *ex parte* communication from the Client Security Fund as a basis for denying Reinstatement to petitioner. App., *infra,* A13. Despite petitioner's request for a de novo hearing, upon said report of the Committees on Character and Fitness, the Supreme Court of the State of New York, Appellate Division, Second Judicial Department denied petitioner's motion for reinstatement in its November 17, 1994, decision and order with notice of entry on December 30, 1994. App., *infra,* A1-A4.

On January 30, 1995, petitioner filed with the Appellate Division a Notice of Motion for Leave to Reargue or De Novo Hearing, or in the Alternative, for Leave to Appeal to the Court of Appeals raising due process issues in his motion as well as other grounds. The Appellate Division denied petitioner's motion without opinion in its decision and order dated March 29, 1995, with Notice of Entry on April 4, 1995. App., *infra,* A5-A8.

Petitioner filed a Motion for Leave to Appeal to the Court of Appeals of the State of New York where he raised the issue of denial of his due process rights as well as other issues. In the respondent's Opposition, the Grievance Committee for the Ninth Judicial District disagreed with petitioner's contention that due process requires notice of and an opportunity to be heard regarding *ex parte* statement provided to the Subcommittee and relied on by the Committees on Character and Fitness. App., *infra,* A15-A19. Further, respondent argued that petitioner, as a disbarred attorney, did not even have a claim of right to the reinstatement hearing itself. The Court of Appeals denied petitioner's motion for leave to appeal in its decision and order dated July 5, 1995. App., *infra,* A9.

The questions presented here are (1) whether a disbarred attorney in fact can claim a 14th Amendment due process right to a reinstatement hearing, and if so (2) whether due process entitles him to have notice and opportunity to respond to post-hearing *ex parte* communications.

REASONS FOR GRANTING THE PETITION

New York State's denial of 14th Amendment due process rights of disbarred attorneys seeking reinstatement conflicts with the *Willner v. Committee on Character and Fitness* and *Schware v. Board of Bar Examiners* decisions of this Court.[1] Guidance from this Court is needed to settle the issue of whether a State can exclude a disbarred attorney seeking reinstatement from the practice of law in a manner that contravenes due process. Finally, the Questions Presented are important.

I. The New York State Court's Denial of Procedural Due Process Rights of Disbarred Attorneys Seeking Reinstatement Conflicts with the Leading Decisions of this Court and Aggravates the Existing Conflict among the Various State Courts

The Court of Appeals of the State of New York decided in *In re Rowe*, that an attorney disbarred for professional misconduct or commission of a felony "has no right to a hearing on reinstatement." 73 N.Y.2d 336, 537 N.E.2d 616, 540 N.Y.S.2d 231 (1989). Furthermore, the Court of Appeals limited the *Willner* and *Schware* cases of this Court to first-time applicants. Despite the fact that both *Willner* and *Schware* unequivocally stated that a "State cannot exclude *a person* from the practice of law...in a manner or for reasons that contravene Due Process,"[2] the New York Court of Appeals in *In*

---

[1] *Willner v. Committee on Character and Fitness*, 373 U.S. 96 (1963); *Schware v. Board of Exam. of State of New Mexico*, 353 U.S. 232 (1957).

[2] *Willner v. Committee on Character and Fitness*, 373 U.S. at 102; *Schware v. Board of Exam. of State of New Mexico*, 353 U.S. at 238.

re Rowe quoted these cases in the following manner, "It is settled that a State cannot exclude *a first time applicant* from the practice of law in a manner that contravenes due process." *In re Rowe*, 73 NY2d 336,338, 537 N.E.2d 616, 617, 540 N.Y.S.2d 231, (1989) (Emphasis added).

One of the respondents in this instant case, the Grievance Committee of the Ninth Judicial District, in its Opposition to this petitioner's Motion for Leave to Appeal to the Court of Appeals of the State of New York (App., *infra,* A15-A19) argued that this petitioner's reliance on *Willner* and *Schware* was "misplaced," since, according to respondent, "a right to due process is not triggered when a disbarred attorney seeks readmission to the bar." App., *infra,* A17.

There are several state courts which have held to the contrary. In the neighboring state of Connecticut, for example, the courts have meticulously applied *Schware* due process procedures to reinstatement cases of disbarred attorneys.[3] In the leading case of *In re Kone*, the Connecticut Supreme Court held that an applicant for reinstatement to the bar is entitled to "an opportunity to be heard, a fair and dispassionate hearing and investigation, and a reasonable exercise of the judicial discretion." 90 Conn. 440, 97 A. 307 (1916).[4]

Alabama is another state that has consistently recognized that a reinstatement hearing for disbarred attorneys was a requirement of due process.[5] The Alabama Supreme Court Rules, similar to the rules of other states, also mandate that a reinstatement hearing for disbarred attorneys must be

---

[3] *Brooks v. Fairfield Cty Comm. on Recommendations for Admission to the Bar*,409 F.Supp. 47 (1976).

[4] *See also Application of Dinan*, 244 A.2d 608 (Conn. 1968).

[5] *Worley v. Alabama State Bar*, 572 So.2d 1239 (Ala. 1990); *Bonner v. Disciplinary Bd. of Ala. State Bar*, 401 So.2d 734 (Ala. 1981); *Elledge v. Alabama State Bar*, 572 So.2d 424 (Ala. 1990). All these cases held that due process means affording a disbarred attorney a reinstatement hearing.

promptly scheduled upon filing of the petition for reinstatement.[6]

On the federal level, the United States Court of Appeals for the Tenth Circuit in reliance on *Schware* determined that due process required that the U.S. District Court for the District of Colorado provide an applicant for readmission with an adequate opportunity to reply or explain, thereby mandating a reinstatement hearing. Short of that, the court found, the process given was insufficient to satisfy constitutional requirements. *Mattox v. Disciplinary Panel of U.S. District Court*, 758 F.2d 1362 (1985).

By contrast, New York has not been consistent in its own decisions regarding the due process rights of disbarred attorneys seeking reinstatement. In a Supreme Court, Appellate Division case, decided five years before the *In Re Rowe* decision of the Court of Appeals, the Appellate Division decided that "as long as the rules permit reinstatement in such cases (disbarment for conversion of client's funds and/or upon conviction of a felony), then due process must afford a hearing in an *appropriate case involving genuinely disputed factual issues* ..."[7]

II. New York's Decision to Deny 14th Amendment Due Process Rights Is Erroneous

This Court specifically expressed the limits whereby a State could exclude individuals from the practice of law in a manner that contravenes due process: no *person*. *Schware*, 353 U.S. at 238. This Court has never limited its decisions to first-time applicants, or to any other particular type of applicant. New York State in its special limitation of due process rights to first-time applicants, has erroneously denied due

---

[6] Ala. Code, Disciplinary Procedure Rule 28(c).

[7] *Application of Licato*, 104 A.D.2d 20, 481 N.Y.S.2d 690 (A.D. 1st Dept. 1984), quoting *Matter of Mairs*, 102 A.D.2d 146, 476 N.Y.S.2d 551. (1st Dept. 1984).

process rights to those persons who were not so excluded by this Court.

A. This Court has determined that the pursuit of the practice of law is a constitutionally protected interest. *Supreme Court of New Hampshire v. Piper*, 470 U.S. 274 (1985). The rationale for determining that the opportunity to practice law is a "fundamental right" was not only the lawyer's role in the national economy, but also the noncommercial role and duty of attorneys. *Id.* at 281.[8]

Although, this Court in *Schware* did not need to decide the issue of whether the practice of law is a right or privilege, Justice Black stated

> Regardless of how the State's grant of permission to engage in this occupation is characterized, it is sufficient to say that a person cannot be prevented from practicing except for valid reasons.

Schware, 353 U.S. at 238, n.5.

This Court further clarified that "(c)ertainly the practice of law is not a matter of the State's grace." *Id.*[9]

Embracing the plain meaning of the word Justice Black used in *Schware*, *person*, establishes that New York is wrong in stating that disbarred attorneys seeking reinstatement, unlike first-time applicants, have no claim to procedural due

---

[8] The *Piper* Court, which dealt with a case concerning a nonresident attorney seeking *admission* to the New Hampshire State bar, distinguished the case of *Leis v. Flynt*, 439 U.S. 438 (1979), where this Court held that out-of-state attorneys, who were not admitted to practice in Ohio, did not have a cognizable property or liberty interest, and therefore, the Constitution did not obligate the Ohio courts to accord such attorneys procedural due process on their application for permission to *appear pro hac vice*.

[9] Quoting *Ex Parte Garland*, 71 U.S. 333 (1866). *See Also Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123 (1951) where this Court held that a state in regulating eligibility for a type of professional employment, cannot foreclose a range of opportunities in a manner that contravenes due process. 341 U.S. at 185.

process rights.[10] Accepting this, the next issue then is what process is due.

B. The Appellate Division, Second Department plainly stated that the post-hearing *ex parte* statement was taken into account and relied on in the decision to deny petitioner's motion for reinstatement. (App., *infra.*, A1). In *Willner*, this Court determined that the New York State Committee on Character and Fitness also did in fact rely on *ex parte* statements, at least to some extent, in reaching its determinations. This Court further found that the New York State Supreme Court, Appellate Division failed to contain an indication that its orders adverse to the applicant were based solely on the applicants own statements. 373 U.S. at 106.

Quoting *Morgan v. United States*, 304 U.S.1 (1938), Justice Black stated in *Willner* that the petitioner had no opportunity to ascertain and contest the bases of the Committee's Report to the Appellate Division, and the Appellate Division gave him no separate hearing. 373 U.S. at 105.

III. The Questions Presented Are Important

Chief Justice Hughes observed that

> The right to a hearing embraces not only the right to present evidence, but also a reasonable opportunity to know the claims of the opposing party and to meet them. The right to submit argument implies that opportunity; otherwise the right may be a barren one.

Morgan v. United States, 304 U.S. at 18.

---

[10] Other nonfirst-time applicants would be suspended attorneys, attorneys who resigned, disbarred attorneys for reasons other than felony convictions or professional misconduct. Additionally, New York attorneys who are convicted of felonies are automatically disbarred by statute. N.Y. Judiciary Law § 90, subd. 4. App., *infra*, A10-A11. Therefore, denying such attorneys the constitutional protection of a reinstatement hearing should be viewed as a serious violation.

This petitioner was denied the opportunity to contest post-hearing *ex parte* statements which involved a genuinely disputed factual issue. Further, New York has made the declaration that disbarred attorneys do not even have a claim of right to due process upon seeking reinstatement.

New York's denial of this fundamental right was wrong. The different interpretations and applications of *Willner* and *Schware* among the various states highlight the fact that guidance from this Court is needed so that the states can consistently apply this Court's decisions.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Simpson Gray
Pro se
165-30 145th Avenue
Springfield Gardens, NY 11434
(718) 527-6941

APPENDIX

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: SECOND JUDICIAL DEPARTMENT

GUY JAMES MANGANO, P.J.
WILLIAM C. THOMPSON
LAWRENCE J. BRACKEN
THOMAS R. SULLIVAN
ALBERT M. ROSENBLATT, JJ.

93-03054

DECISION & ORDER ON MOTION

In the Matter of S. Simpson Gray, a disbarred attorney, for Reinstatement to the Bar of the State of New York

---

Motion by the petitioner, S. Simpson Gray, for reinstatement as an attorney and counselor-at-law. The petitioner was admitted to the practice of law by the Appellate Division, Second Judicial Department on November 14, 1979. By opinion and order of this court, dated December 30, 1985, the petitioner was disbarred from the practice of law, effective immediately (*see, Matter of Gray* 113 AD 2d 500). By further decision and order on motion dated July 22, 1993, the petitioner's motion for reinstatement was held in abeyance and the matter was referred to the Committee on Character and Fitness for investigation and report as to the petitioner's current fitness to be an attorney. The Committee has now rendered its report.

Upon the report of the Committee on Character and Fitness, it is

ORDERED that the motion is denied.

We find that the petitioner does not demonstrate the requisite fitness and character and fitness to practice law.

MANGANO, THOMPSON, BRACKEN, SULLIVAN and ROSENBLATT, JJ., concur.

ENTER:

/s/ Martin H. Brownstein
Clerk

November 17, 1994

APPELLATE DIVISION SECOND DEPT

I, MARTIN H. BROWNSTEIN, Clerk of the Appellate Division of the Supreme Court, Second Judicial Department, do hereby certify that I have compared this copy with the original filed in my office on November 17, 1994 and that this copy is a correct transcription of said original.

IN WITNESS WHEREOF I have hereunto set my hand and affixed the seal of this Court on November 17, 1994

/s/ Martin H. Brownstein

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION - SECOND DEPARTMENT

In the Matter of S. SIMPSON GRAY,
a Disbarred Attorney,
For Reinstatement to the Bar of the
State of New York,

DECISION & ORDER ON MOTION
With NOTICE OF ENTRY
And AFFIDAVIT OF SERVICE

GARY L. CASELLA

Attorney for N.Y. State Grievance Committee
Office and Post Office Address, Telephone
STATE OF NEW YORK
GRIEVANCE COMMITTEE
NINTH JUDICIAL DISTRICT
CROSSWEST OFFICE CENTER
399 KNOLLWOOD ROAD - SUITE 200
WHITE PLAINS, NEW YORK 10803
(914) 949-4540

To: S. SIMPSON GRAY
165-30 145 Avenue
Springfield Gardens, NY 11434
Attorney Pro Se

Service of a copy of the within is hereby admitted

Dated,

Attorney(s) for

Sir: — Please take notice

☒ NOTICE OF ENTRY

that the within is a (*certified*) true copy of a Decision & Order on Motion duly entered in the office of the clerk of the within named court on November 17, 1994

☐ NOTICE OF SETTLEMENT

that an order of which the within is a true copy will be presented for settlement to the HON. one of the judges of the within named court at on 19 at M

Dated, White Plains, NY
December 30, 1994

Yours, etc.

GARY L. CASELLA
N.Y.S. Grievance Committee

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION:
SECOND JUDICIAL DEPARTMENT

0557S
S/em

GUY JAMES MANGANO, P.J
LAWRENCE J. BRACKEN
THOMAS R. SULLIVAN
VINCENT R. BALLETTA, JR.
ALBERT M. ROSENBLATT, JJ.

93-03054

DECISION & ORDER
ON MOTION

In the Matter of the Application of
S. Simpson Gray, a disbarred attorney,
for Reinstatement to the Bar of the
State of New York

By order of this court dated December 30, 1995, the petitioner, admitted to the practice of law by this court on November 14, 1979, was disbarred based upon a felony conviction (*see, Matter of Gray,* 113 AD2d 500). By further order of this court dated July 22, 1993, the petitioner's application for reinstatement was held in abeyance and the matter was referred to the Committee on Character and Fitness for investigation and report. Thereafter, by order dated November 17, 1994, this court denied the petitioner's application for reinstatement. The petitioner has now moved for reargument of this court's November 17, 1994 decision, or in the alternative, leave to appeal to the Court of Appeals.

Upon the papers filed in support of the motion and the papers filed in response thereto, it is

ORDERED that the motion is denied.

MANGANO, P.J., BRACKEN, SULLIVAN, BALLETTA and ROSENBLATT, JJ., concur.

ENTER:

/s/Martin H. Brownstein
Clerk

March 29, 1995

MATTER OF GRAY, S. SIMPSON

SUPREME COURT, STATE OF NEW YORK
APPELLATE DIVISION SECOND DEPT

I, MARTIN H. BROWNSTEIN, Clerk of the Appellate Division of the Supreme Court, Second Judicial Department, do hereby certify that I have compared this copy with the original filed in my office on MAR 29 1995 and that this copy is a correct transcription of said original.

IN WITNESS WHEREOF I have hereunto set my hand and affixed the seal of this Court on MAR 29 1995

/s/ Martin H. Brownstein

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION - SECOND JUDICIAL DEPARTMENT

In the Matter of the Application of
S. Simpson Gray, a Disbarred Attorney,
for Reinstatement to the Bar of the
State of New York,

DECISION & ORDER ON MOTION
With
NOTICE OF ENTRY & AFFIDAVIT OF SERVICE

GARY L. CASELLA

Attorney for N.Y. State Grievance Committee
Office and Post Office Address, Telephone
STATE OF NEW YORK
GRIEVANCE COMMITTEE
NINTH JUDICIAL DISTRICT
CROSSWEST OFFICE CENTER
399 KNOLLWOOD ROAD - SUITE 200
WHITE PLAINS, NEW YORK 10603
(914) 949-4540

To: S. Simpson Gray
Christian Motivational Ministry
P.O. Box 52-7144
New York, NY 11855

Service of a copy of the within is hereby admitted

Dated,

_____
Attorney(s) for

Sir: — Please take notice

☒ *NOTICE OF ENTRY*

that the within is a (*certified*) true copy of a Decision & Order on Motion duly entered in the office of the clerk of the within named court on March 29, 1995

☐ *NOTICE OF SETTLEMENT*

that an order of which the within is a true copy will be presented for settlement to the HON. one of the judges of the within named court at on 19 at M

Dated, White Plains, NY
April 4, 1995

Yours, etc.

GARY L. CASELLA
Attorney for N.Y. State
Grievance Committee
Office and Post Office Address Telephone

To: S. Simpson Gray
Christian Motivational Ministry
P.O. Box 52-7144
New York, NY

STATE OF NEW YORK
COURT OF APPEALS

At a session of the Court, held at Court of Appeals Hall in the City of Albany on the fifth day of July 1995

PRESENT, HON. JUDITH S. KAYE, *Chief Judge, presiding.*

2-12 Mo. No. 673

In the Matter of S. Simpson Gray, a disbarred attorney, for Reinstatement to the Bar of the State of New York.

A motion for leave to appeal to the Court of Appeals in the above cause having heretofore been made upon the part of the appellant herein and papers having been submitted thereon and due deliberation having been thereupon had, it is

ORDERED, that the said motion be and the same hereby is denied.

/s/Donald M. Sheraw
Donald M. Sheraw
Clerk of the Court

§ 90. Admission to and removal from practice by appellate division; character committees

* * *

4. a. Any person being an attorney and counsellor-at-law who shall be convicted of a felony as defined in paragraph e of this subdivision, shall upon such conviction, cease to be an attorney and counsellor-at-law, or to be competent to practice law as such.

b. Whenever any attorney and counsellor-at-law shall be convicted of a felony as defined in paragraph e of this subdivision, there may be presented to the appellate division of the supreme court a certified or exemplified copy of the judgment of such conviction, and thereupon the name of the person so convicted shall, by order of the court, be struck from the roll of attorneys.

c. Whenever an attorney shall be convicted of a crime in a court of record of the United States or of any state, territory or district, including this state, whether by a plea of guilty or nolo contendere or from a verdict after trial or otherwise, the attorney shall file, within thirty days thereafter, with the appellate division of the supreme court, the record of such conviction.

The failure of the attorney to so file shall be deemed professional misconduct provided, however, that the appellate division may upon application of the attorney, grant an extension upon good cause shown.

d. For purposes of this subdivision, the term serious crime shall mean any criminal offense denominated a felony under the laws of any state, district or territory of the United States which does not constitute a felony under the laws of this state, and any other crime a necessary element of which, as determined by statutory or common law definition of such crime, includes interference with the administration of justice, false swearing, misrepresentation, fraud, willful failure to file income tax returns, deceit, bribery, extortion, misappropriation,

theft, or an attempt or conspiracy or solicitation of another to commit a serious crime.

e. For purposes of this subdivision, the term felony shall mean any criminal offense classified as a felony under the laws of this state or any criminal offense committed in any other state, district, or territory of the United States and classified as a felony therein which if committed within this state, would constitute a felony in this state.

f. Any attorney and counsellor-at-law convicted of a serious crime, as defined in paragraph d of this subdivision, whether by plea of guilty or nolo contendere or from a verdict after trial or otherwise, shall be suspended upon the receipt by the appellate division of the supreme court of the record of such conviction until a final order is made pursuant to paragraph g of this subdivision.

Upon good cause shown the appellate division of the supreme court may, upon application of the attorney or on its own motion, set aside such suspension when it appears consistent with the maintenance of the integrity and honor of the profession, the protection of the public and the interest of justice.

g. Upon a judgment of conviction against an attorney becoming final the appellate division of the supreme court shall order the attorney to show cause why a final order of suspension, censure or removal from office should not be made.

h. If the attorney requests a hearing, the appellate division of the supreme court shall refer the proceeding to a referee, justice or judge appointed by the appellate division for hearing, report and recommendation.

After said hearing, the appellate division may impose such discipline as it deems proper under the facts and circumstances.

5. a. If such removal or debarment was based upon conviction for a serious crime or upon a felony conviction as defined in subdivision four of this section, and such felony conviction

was subsequently reversed or pardoned by the president of the United States, or governor of this or another state of the United States, the appellate division shall have power to vacate or modify such order or debarment, provided, however, that if such attorney or counsellor-at-law has been removed from practice in another jurisdiction, a pardon in said jurisdiction shall not be a basis for application for re-admission in this jurisdiction unless he shall have been readmitted in the jurisdiction where pardoned.

b. If such removal or debarment was based upon conviction for a felony as defined in subdivision four of this section, the appellate division shall have power to vacate or modify such order or debarment after a period of seven years provided that such person has not been convicted of a crime during such seven-year period.

c. An attorney and counsellor-at-law who has been convicted of a felony without the state and whose name has been struck from the roll of attorneys prior to July thirteenth, nineteen hundred seventy-nine by virtue of the provisions of subdivision four of this section may, if he alleges that such felony committed without the state would not constitute a felony if committed within the state, petition the appellate division to vacate or modify such debarment. If the appellate division finds that the felony of which the attorney and counsellor-at-law has been convicted without the state would not constitute a felony if committed within the state, it shall grant a hearing and may retroactively vacate or modify such debarment and impose such discipline as it deems just and proper under the facts and circumstances.

The attorney and counsellor-at-law shall petition for reinstatement by filing in the appellate division a copy of the order of removal together with a request for a hearing pursuant to the provisions of this paragraph. Upon such application, the order of removal shall be deemed an order of suspension for the purposes of a proceeding pursuant to this paragraph.

* * *

SUPREME COURT APPELLATE DIVISION
SECOND JUDICIAL DEPARTMENT

OFFICE OF COMMITTEES ON CHARACTER
AND FITNESS
210 JORALEMON STREET, 13TH FLOOR, BROOKLYN,
NEW YORK 11201

BARTHOLOMEW M. VERDIRAME,
EXECUTIVE SECRETARY
STEPHEN B. SIEBER, ASSISTANT SECRETARY

In the Matter of the Application
of
S. SIMPSON GRAY
For Reinstatement to the Bar
of the State of New York

REPORT TO THE COURT

The members of the Character Committee for the Ninth Judicial District unanimously adopted the recommendation of the Subcommittee, consisting of J. Addison Young, II, Esq., and Kevin J. Plunkett, Esq., which recommended that applicant be denied Reinstatement.

The Subcommittee's recommendation was based upon the following:

1. Applicant's failure to satisfy approximately ten complaints against him as an attorney in Pennsylvania which were the cause of disciplinary proceedings to be commenced against him in that jurisdiction;

2. Applicant's failure to fully comply with the condition set forth in his March 1985 conviction for larceny, requiring that he pay back approximately $16,000.00 to his clients who had been injured through his misuse of their funds. (The Lawyer's Fund for Client Protection communicated to the Committee that the balance still owed is $8,528.00);

3. Applicant's indebtedness of $12,000.00 to his former landlord. Applicant is unsure whether this indebtedness has been cancelled by his bankruptcy proceedings;

4. Applicant's failure to notify his clients in writing as is required by §691.10(c) of the Rules of the Supreme Court Appellate Division, Second Judicial Department;

5. Applicant's receipt of a $300.00 attorney fee subsequent to his disbarment without being able to provide documentation of prior Court approval upon a quantum meruit determination as is required by §691.10(b) of the Rules;

6. The questionable ethics involved in applicant's conduct subsequent to his disbarment when he, as a Real Estate Broker, purchased a house from one Mrs. Kurakose, a client.

Respectfully submitted,

/s/Bartholomew M. Verdirame

Bartholomew M. Verdirame
Executive Secretary

BMV:da

Dated: June 17, 1994
Brooklyn, N.Y.

COURT OF APPEALS
STATE OF NEW YORK

----------X

In the Matter of S. SIMPSON GRAY,
a disbarred attorney,

S. SIMPSON GRAY,

Petitioner,

GRIEVANCE COMMITTEE FOR THE
NINTH JUDICIAL DISTRICT,

Respondent.

----------X

RESPONDENT'S STATEMENT IN OPPOSITION TO MOTION FOR LEAVE TO APPEAL

GARY L. CASELLA
Attorney for Respondent

GLORIA A. BUNZE
Of Counsel

STATE OF NEW YORK
GRIEVANCE COMMITTEE FOR THE
NINTH JUDICIAL DISTRICT
CROSSWEST OFFICE CENTER
399 KNOLLWOOD ROAD - SUITE 200
WHITE PLAINS, NEW YORK 10603
914-949-4540

----------X

In the Matter of S. SIMPSON GRAY,
a disbarred attorney,

S. SIMPSON GRAY,

Petitioner,

GRIEVANCE COMMITTEE FOR THE NINTH JUDICIAL DISTRICT,

Respondent.

OPPOSITION TO MOTION FOR LEAVE TO APPEAL

----------X

The Grievance Committee for the Ninth Judicial District, Respondent herein, submits this statement in opposition to Petitioner's motion for leave to appeal to this Court pursuant to CPLR § 5602(a)(1)(i), which provides that this Court may grant leave to appeal from a final order of the Appellate Division in cases which are not appealable as of right.

QUESTIONS PRESENTED FOR REVIEW

Petitioner presents the following questions for review:

1. Whether a letter from The Lawyers' Fund for Client Protection to the Committee on Character and Fitness, submitted after Petitioner's hearing before said Committee, advising that The Lawyers' Fund had made nine awards totaling $8,928 to Petitioner's former clients and that Petitioner had made no restitution, constitutes a denial of due process of law.

POINT I

Petitioner claims that his constitutional right to due process was denied because he was not given an opportunity to respond to an "ex-parte" post-hearing letter sent by The Lawyers' Fund for Client Protection to the Committee on Character and Fitness, advising that Petitioner had failed to make any restitution for the $8,928 that the fund had paid to his former clients. Petitioner similarly claims that his constitutional rights were denied because the Committee allegedly

relied on his past rather than his present moral character, because it failed to find him "rehabilitated" based on "a religious conversion" and because he was denied a de novo hearing to challenge the Committee's report.

In support of his constitutional claims, Petitioner relies on *Willner v. Committee on Character and Fitness*, 373 U.S. 96 (1963); *Schware v. Board of Bar Examiners*, 353 U.S. 232 (1957); and on *Yick Wo v. Hopkins*, 118 U.S. 356 (1886). Respondent respectfully submits that Petitioner's reliance is misplaced.

Yick Wo is a seminal case that stands for the propositions that a person cannot be deprived of his livelihood without due process, and that all persons within the territorial jurisdiction are entitled to equal protection of the law, regardless of differences of race, color or nationality. It does not directly bear on the questions presented in the instant matter.

Willner and *Schware* support the proposition that the right to practice law is an important property interest that triggers a right to procedural due process. However, *Willner* and *Schware* involve initial applications for admission to the Bar, whereas the instant matter involves an application for readmission by a *disbarred* attorney. The distinction is critical: While an applicant for admission to the Bar has a property interest in a license to practice law, a disabarred attorney has forfeited his license, having been found unfit to practice. Thus, a right to procedural due process is not triggered when a disbarred attorney seeks readmission to the bar.

Petitioner's Table of Authorities also lists *Matter of Mairs*, 102 A.D.2d 146, 476 N.Y.S.2d 551 (1st Dept. 1984), although it is not discussed in his motion. The respondent in *Mairs* was disbarred by the Appellate Division, First Department, upon offering his resignation after a complaint that he had converted a considerable sum of money; he did not have a disciplinary hearing before he was disbarred. Upon Mr. Mairs's application for reinstatement, the Court found that a hearing was needed to resolve unanswered factual questions.

Petitioner was disbarred based on a felony conviction and, like Mairs, had no hearing before discipline was imposed. However, upon his application for reinstatement, Petitioner *was* afforded a hearing before the Committee on Character and Fitness, at which factual issues were explored, including restitution, and he was given an opportunity to present clear and convincing evidence that he possesses the requisite character and fitness to practice law. Petitioner failed to sustain his burden of proof regarding his fitness to practice, and the Committee unanimously recommended that he be denied reinstatement.

Petitioner's belief that he is entitled to an *additional* evidentiary hearing to challenge the Committee's post-hearing report to the Appellate Division, is erroneous. Petitioner's only right under New York law is his right to submit an application for reinstatement. Unlike cases involving applications for reinstatement following suspension, in cases involving applications for reinstatement following disbarment, there is *no* presumption that if the attorney has complied with the Court's order and demonstrates his character and fitness, he will be reinstated. This is true irrespective of whether the disbarment is imposed after a hearing or in cases in which disbarment is imposed without a hearing, as a result of resignation, as in *Mairs*, or following a criminal conviction, as in the instant matter.

Although Section 90 of the Judiciary Law, subdivision 5(b), specifies that the Appellate Division "shall have power to vacate" a disbarment, there is no mandate that it must do so. Moreover, this Court has consistently held that disciplinary sanctions, including determining whether or not a disbarred attorney should be restored to the bar, are within the Appellate Division's exclusive jurisdiction.

The applicable rule for the case at bar is 22 NYCRR 691.11, which governs the Second Department. Section 691.11(a) is premised upon an underlying assumption that disbarment is for an indefinite period, and provides that a disbarred attorney "may not apply for reinstatement until the

expiration of at least seven years from the effective date of the disbarment or removal." Section 691.11(b) of the Appellate Division, Second Department's, rules provides that such application "*may* be granted by this court . . ." [emphasis added]; it does not *require* that such application be granted. Again, any decision to do so would be purely discretionary on the part of the Appellate Division.

It is respectfully submitted that Petitioner has failed to present any due process concerns that warrant review by this Court.

BEST AVAILABLE COPY

No. 95-568

(2)

Supreme Court, U.S.
FILED
NOV 13 1995
CLERK

IN THE

Supreme Court of the United States

October Term, 1995

In the Matter of S. SIMPSON GRAY, a Disbarred Attorney, For Reinstatement to the Bar of the State of New York,

Petitioner,

against

STATE OF NEW YORK GRIEVANCE COMMITTEE FOR THE NINTH JUDICIAL DISTRICT

and

SUPREME COURT OF THE STATE OF NEW YORK APPELLATE DIVISION, SECOND JUDICIAL DEPARTMENT COMMITTEES ON CHARACTER AND FITNESS,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

BRIEF OF RESPONDENT COMMITTEES ON CHARACTER AND FITNESS IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

VICTORIA A. GRAFFEO
Solicitor General and
Counsel of Record

PETER H. SCHIFF
Deputy Solicitor General

DANIEL SMIRLOCK
Assistant Attorney General
Of Counsel

DENNIS C. VACCO
Attorney General of the State of New York
Attorney for Respondent
Committees on Character and Fitness
The Capitol
Albany, NY 12224
(518) 473-0903

Dated: November 7, 1995

THE REPORTER CO., INC.- Walton, NY 13856 - 800-252-7181
Syracuse Office, University Building, Syracuse, NY 13202 - 315-426-1235
NYC Office - 30 Vesey St., New York, NY 10007 - 212-732-6978 - 800-800-4264
(1573 – 1995)
Printed on Recycled Paper

11 pp

Counterstatement of Question Presented

Whether this Court should grant certiorari to determine the contours of the asserted right of petitioner, a disbarred New York attorney denied reinstatement to the practice of law, to procedural due process on his petition for reinstatement, when petitioner received a full evidentiary hearing before the Committee on Character and Fitness of the Appellate Division, Second Department, and the multiple reasons for the denial of reinstatement arose from his presentation of evidence that persuaded the Committee to recommend to the Appellate Division that petitioner had failed to carry his burden of proving by clear and convincing evidence that he had the requisite character and fitness to be reinstated to the practice of law.

Table of Contents

Page

Counterstatement of Question Presented i

Statement of the Case 2

REASONS FOR DENYING THE WRIT

Petitioner was not denied any due process rights in the course of proceedings on his application for reinstatement 4

Conclusion 7

TABLE OF AUTHORITIES

Page

CASES:

Brooks v Fairfield County Committee on Recommendations for Admission to the Bar, 409 F Supp 47 (D Conn 1976) 4

Gray, Matter of, 113 AD2d 500 (2d Dept 1985) 2

Rowe, Matter of, 73 NY2d 336 (1989) 4, 5

Schware v Board of Examiners of State of New Mexico, 353 US 232 (1957) 4

Willner v Committee on Character and Fitness, 373 US 96 (1963) 4

STATUTE:

22 NYCRR §691.11(b)(1) 6

No. 95-568

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1995

In the Matter of S. SIMPSON GRAY, a Disbarred Attorney, For Reinstatement to the Bar of the State of New York,

Petitioner,

-against-

STATE OF NEW YORK GRIEVANCE COMMITTEE FOR THE NINTH JUDICIAL DISTRICT

and

SUPREME COURT OF THE STATE OF NEW YORK APPELLATE DIVISION, SECOND JUDICIAL DEPARTMENT COMMITTEES ON CHARACTER AND FITNESS,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

BRIEF OF RESPONDENT COMMITTEES ON CHARACTER AND FITNESS IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Statement of the Case

Petitioner S. Simpson Gray was convicted in New York State on three counts of grand larceny in 1985. He was sentenced to five years probation and two thousand hours of community service, and was required to make restitution of approximately $16,000 to clients who had been injured through his misuse of their funds. He was subsequently disbarred from the practice of law by the Appellate Division, Second Department. *See, Matter of Gray*, 113 AD2d 500 (2d Dept 1985).

In 1993, petitioner moved in the Appellate Division for reinstatement as an attorney. The Appellate Division referred the matter to its Committee on Character and Fitness for investigation and report as to petitioner's fitness to practice law. On March 11, 1994, petitioner received a full hearing before the Committee, at which he offered sworn testimony and was given an opportunity to present evidence of his current character and fitness, including his compliance with the requirement that he make restitution. He testified that "[m]y restitution balance is still about $5,300, but, upon information and belief, all three of the complaining witnesses in the criminal trial were paid this balance by the Client Fund." Shortly after the hearing, the "Client Fund" -- that is, the Lawyers Fund for Client Protection of the State of New York, which is charged with providing restitution to clients victimized by their lawyers -- advised the Committee by letter that the Fund "ha[d] provided nine awards totalling $8,928 to [petitioner's] former clients" but "ha[d] received no restitution" from petitioner.

On June 17, 1994, the Committee issued a report to the Appellate Division, unanimously recommending that petitioner be denied reinstatement. The Committee offered six separate reasons for this recommendation: Petitioner's failure to satisfy

certain complaints against him as an attorney in Pennsylvania; his failure "to fully comply" with the restitution requirement of his larceny conviction; his indebtedness of $12,000 to a former landlord, as to which petitioner professed to be "unsure whether this indebtedness has been cancelled by his bankruptcy proceedings"; his failure to notify his clients of his disbarment, as required by Appellate Division rules; his receipt of an attorney's fee after his disbarment without prior Court approval; and "[t]he questionable ethics involved in [his] conduct [as a real estate broker] subsequent to his disbarment."

On November 17, 1994, the Appellate Division denied petitioner's motion for reinstatement, finding that he "does not demonstrate the requisite fitness and character and fitness [sic] to practice law." Petitioner then moved in the Appellate Division for reargument or for permission to appeal to the New York Court of Appeals. This motion was denied on March 29, 1995. The New York Court of Appeals, on July 5, 1995, likewise denied petitioner's motion for leave to appeal.

REASONS FOR DENYING THE WRIT

Petitioner was not denied any due process rights in the course of proceedings on his application for reinstatement.

The hearing accorded petitioner by the Committee on Character and Fitness of the Appellate Division, Second Department provided all the process that might conceivably be due petitioner on his application for reinstatement as an attorney. The present case neither creates a conflict among decisions nor raises any question that the Appellate Division's procedures are constitutionally inadequate.

Petitioner first erroneously suggests that there is a conflict between the decisions of this Court and the New York Court of Appeals. This Court has held that a State cannot exclude an applicant from the practice of law "in a manner or for reasons that contravene Due Process." *Willner v Committee on Character and Fitness*, 373 US 96, 102 (1963); *Schware v Board of Examiners of State of New Mexico*, 353 US 232, 238 (1957). At least one other court has found due process protections specifically applicable to disbarred attorneys seeking readmission to a state bar, as well as to first-time applicants. *See*, *Brooks v Fairfield County Committee on Recommendations for Admission to the Bar*, 409 F Supp 47, 50 (D Conn 1976).

In dictum, the New York Court of Appeals commented that an attorney who has been "disbarred for professional misconduct or commission of a felony" cannot claim a right to reinstatement that is hedged about with due process protections, for "[t]he disbarred attorney has been granted" the property right to practice of law that is protected by due process, "but has been proven unfit because of some violation of the public trust." *Matter of Rowe*, 73 NY2d 336, 338 (1989). *Rowe*, however, did

not involve a disbarred attorney. Rather, it involved "[a]n attorney suspended because of mental disability," whom the Court distinguished from a disbarred attorney by virtue of "retain[ing] a property interest in his license during the period of suspension" and who in fact was held to be entitled by due process to a hearing to resolve questions of fact regarding his reinstatement. 73 NY2d at 338-339. Neither *Rowe* nor any other New York case has ever held that a disbarred attorney is not entitled to a hearing or other due process protection upon an application for reinstatement. Nor, it appears, has such a hearing ever actually been denied in New York to disbarred applicants. Thus, the supposed "conflict" on which petitioner bases his petition is nonexistent.

Nor was petitioner himself denied the right he asserts. He appears to suggest ("Questions Presented," Petition, p. i) that he is aggrieved by the denial of a hearing. It is undisputed, however, that he received a full evidentiary hearing before the Committee on Character and Fitness, at which he offered his own testimony, submitted documentary evidence, and had the opportunities (though he did not avail himself of them) to be represented by counsel and present other witnesses. He cannot complain of any constitutional deficiencies in the hearing he received. Petitioner likewise is not aggrieved by the fact that the Appellate Division, Second Department did not offer him a *de novo* hearing on the question of his reinstatement. One full hearing is constitutionally sufficient.

Nor, finally, was the Committee's recommendation somehow tainted by its reliance on a letter to the Committee from the Lawyer's Fund for Client Protection. First, petitioner's failure to reimburse the Fund for its restitution to his cheated clients was only one of six separate bases for the Committee's recommendation. More importantly, the precise issue discussed in the Fund's

letter was the subject of substantially corroborative testimony by petitioner himself. According to petitioner, he owed the Fund "about $5,300"; in the Fund's view, his liability was $8,928. The exact amount in question is hardly material and certainly cannot form the basis of a claim that the actual hearing was defective or that a new hearing is required.

Petitioner was obliged to make a showing "by clear and convincing evidence that he has fully complied with the provisions of the order disbarring * * * him * * * and that he possesses the character and general fitness to practice law." 22 NYCRR §691.11(b)(1). He was accorded a full evidentiary hearing at which to make the necessary showing. With or without the supposedly "ex parte" letter of the Fund for Client Protection, he failed to do so. He cannot now complain that the procedures employed by the State of New York in reaching this conclusion did not afford him due process of law.

CONCLUSION

The petition for a Writ of Certiorari should be denied.

Dated: Albany, New York
November 7, 1995

Respectfully submitted,
DENNIS C. VACCO
Attorney General of the State of New York
Attorney for Respondent Committees on Character and Fitness

VICTORIA A. GRAFFEO
Solicitor General and
Counsel of Record

PETER H. SCHIFF
Deputy Solicitor General

DANIEL SMIRLOCK
Assistant Attorney General

of Counsel